United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

3-3

75-7692

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MILTON RAFER,

Plaintiff-Appellee,

-vs-

ROY M. COHN, THOMAS A. BOLAN, SCOTT E. MANLEY, DANIEL J. DRISCOLL, MELVIN RUBIN, MICHAEL ROSEN and HAROLD L. SCHWARTZ, members of the law firm of SAXE, BACON and BOLAN,

Defendants,

SAXE, BACON & BOLAN, ROY M. COHN, MICHAEL ROSEN, DANIEL J. DRISCOLL, and SCOTT E. MANLEY,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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3. Are not all law partners of an attorney liable with him for his negligent malpractice which causes money loss to a client?

STATEMENT OF THE CASE

(All "A" references are to either the appendix to the defendants-appellants' brief or to the appendix to this brief, e. g., D2a-6, i. e., page 2 of the defendants-appellants' appendix, line 6; or P4a-6, i. e., page 4 of the plaintiff-appellee's appendix, line 6. All "T" references ar to the trial transcript, e. g., T21-15, i. e., page 21 of the transcript, line 15.)

NATURE OF THE PROCEEDINGS

This is the defendants' appeal (D4a) from a judgment (D3a) of the United States District Court for the Southern District of New York, in favor of the plaintiff, a former client, for damages against the defendants, New York attorneys, for negligent malpractice. The case was tried before Gagliardi, D. J., sitting without a jury.

STATEMENT OF FACTS

The plaintiff-appellee, a New Jersey resident, hereinafter referred to as "the client," a certified public accountant, was convicted in the District Court for the Southern District of New

York (United States of America v. Raffer) on October 7, 1971, after a trial by jury, of various counts of an indictment charging the use of interstate commerce to effect a scheme to defraud relating to securities and the delivery and sale of unregistered securities. (P2a-1 to 8, 21 to 25)

On October 27, 1971, he retained the defendant, Roy Cohn, to handle an appeal from his conviction, and made a down payment of $5,000 to Cohn as a retainer fee. (T20 to 22; P16a, 17a)

On November 11, 1971, he was sentenced to one year imprisonment and fined $20,000. (P3a-1 to 5)

On November 16, 1971, his trial attorney, Frederick Block, filed a notice of appeal. (P3a-6, 7)

By order dated December 3, 1971 (this Court's docket No. 71-2138), the Honorable Henry J. Friendly directed, among other things, that the record be docketed on or before December 13, 1971; the brief and appendix of the client be filed on or before January 13, 1972; and that if the client's brief or appendix were not filed by the time directed, the clerk was directed to dismiss the appeal. Said order also noted that the said Frederick Block "is counsel of record" for the client. As required, the record was timely filed. (P3a-9 to 17)

Thereafter, by motion dated January 11, 1972 (P1a), the defendant firm, Saxe, Bacon & Bolan, as attorneys for the client, moved for an order "enlarging the time within which appellant may file

his appendix and brief from January 13, 1972 to February 24, 1972.

On January 13, 1972, Judge Friendly granted the motion permitting the filing of the client's brief and appendix on or before January 28, 1972. Judge Friendly's order contained a direction that in default thereof the clerk was to dismiss the appeal. (P4a-5 to 9) The same affidavit of the defendant Cohn goes on to say (P4a-10 to 6a-16):

> "Neither I nor my office was notified of this order. In short, we did not know that January 28, 1972 was the deadline for the filing of appellant's brief and appendix.
>
> "It is now known that the Clerk's office transmitted said order to Frederick Block, notwithstanding the appearance of my firm's name on the motion of January 11, 1972.
>
> * * *
>
> "Neither my office nor I ever received notification from Mr. Block as to the January 28, 1972 filing date.
>
> "On February 3, 1972, (the defendant) Michael Rosen, Esq., an associate of my firm, * * * learned that the appeal had been dismissed on January 28th.
>
> "Mr. Rosen immediately, and in my absence, prepared (5a) a motion for an order vacating the dismissal of the appeal.
>
> * * *
>
> "On February 9, 1972, * * * I prepared a letter to the Clerk of the Court (with copy to the U. S. Attorney) that the brief and appendix were being filed, subject to the

Court's permission. * * *

"On February 22, 1972, nearly two weeks after the submission of the brief and appendix to the Clerk, Judge Friendly denied our motion to vacate the dismissal of the appeal.

"(6a) On February 23, 1972, * * * we moved for reconsideration and reargument. * * *

"By order dated February 28, 1972, Judge Friendly denied our motion to reconsider the motion to vacate the dismissal of the appeal. * * *

"One thing is very clear from a consideration of the foregoing -- none of the acts or omissions described above was the fault of the appellant."

Both in the foregoing affidavit (P2a-14, 15) and in two allied affidavits (P11a-13, 14; 13a-11, 12), the defendant Cohn states:

"I am a member of the firm of Saxe, Bacon & Bolan, attorneys for the appellant.* * *."

As will be seen hereinafter, the client served out his prison term and, after his release, engaged his present New Jersey counsel to seek reinstatement of the appeal so that it could be heard on the merits. See this Court's docket No. T-657, MR 5192. The appeal was reinstated, thereafter perfected and resulted in an affirmance of the conviction.

In addition to the foregoing, here is <u>the evidence below</u>:

The client testified on his own behalf as follows:

He identified a letter, dated May 19, 1972, addressed to him, on the stationery of Saxe, Bacon & Bolan and signed by the defendant, Roy M. Cohn. The letter was received in evidence as Plaintiff's Exhibit 7. (T17-24 to 18-12; P15a) Between its date and Cohn's signature, the letter reads:

"Mr. Milton Raffer (#75280 - 158 E - X)

P. O. Box 1000

Lewisburg, Pennsylvania 17837

Dear Milton:-

I have your letters and I am going over your papers with (the defendant) Mike Rosen in some detail next week to see the proper course of action.

We will certainly take some action. I am considering writing to Judge Cannella concerning early parole.

We will keep you posted.

Sincerely,"

Going back to October 27, 1971, as the client further testified, "Mr. Cohn told me that he would handle my appeal and that he wanted a fee of $10,000. And I asked him if it was all right if I would pay him $5,000 on account at that time and, as I went along, paid him the balance each couple of weeks * * * He said it would be quite all right." (T21-23 to 22-5)

He further testified (T24-12 to 20):

"Q Tell me what Mr. Cohn told you about who would be

your lawyer on appeal? A Well, he * * * gave me the name of an attorney called Henry something -- I don't recall the second name -- but that he would handle it with his law firm. That's it. Q With what law firm? A Saxe, Bacon & Bolen."

On November 22, 1971, he paid Cohn another $1,250. (T26-14 to 20).

On December 9, 1971, he paid Cohn another $1,250. (T25-4 to 6)

On January 21, 1972, he paid Cohn another $2,500. (T27-24 to 28-4) That final check, he hand-delivered to Cohn. "I was anxious to know what had happened with my appeal. I gave it to him, and he said everything is going along all right and that's it, he'll let me know." (T29-13 to 18)

On February 16, 1972, he paid The Reporter Company $1,028.03. The circumstances which led up to his making out that check were these: A Mr. Rubin, who had been introduced to the client in Cohn's office at Saxe, Bacon & Bolan as a member of the firm, called the client (T32-15 to 32-25),

"and he told me that in order to get the brief and the appendix filed and so on, and paid for, he had to have a check immediately for $1,028.03. So I made out the check, ran into New York and gave it to Mr. Rubin. Q What was the check for? A * * * printing for brief

and appendix."

On March 30, 1972, the client got a letter from the Justice Department, telling him to report and be incarcerated in the federal penitentiary. Immediately, in a panic, he called up the law firm and asked for Cohn. Cohn was out of town, but Rubin was there and told the client to come down and bring the letter. "He took the letter and read it and said, 'Forget about it, we'll handle it from here on in. There is a mistake here somewhere.'" (T34-23 to 35-14)

After that, during the week, the client called Rubin. "Mr. Rubin told me that Mr. Cohn was in Texas, he was coming home. And he would handle the entire thing with the Court of Appeals or somebody, * * *." (T35-25 to 36-6)

(On the witness stand, the client had been referring to the lawyer he had been talking to as being named Rubin. However, in court, when asked if he recognized that lawyer, he pointed to the defendant, Rosen, and said, "I am sorry, * * * I had been referring to the right party with the wrong name." (T36-18 to 37-3))

Later on in that week, the client spoke to Rosen again, and asked him what happened. "He said * * * he expects Mr. Cohn home the next day, and he will proceed in the matter before the courts, and he will let me know what is going to happen." (T37-25 to 38-8)

He further testified (T38-16 to 39-11):

"On April 3, * * * I got a call from Mr. Cohn, who told me to sit home and wait, because he is going to see some-

> body and get this whole thing straightened out. And so I sat home and waited for Mr. Cohn to call me. He did call me and he said, 'Come down to my office immediately. I got to tell you something.' So I took off and went down to his office immediately. * * * (39) * * * When I got down there, he said to me, 'Milt, the appeal was not perfected because of Frederick Block.' I said, 'Where did Fred Block get into this thing?' He said, 'Well, a notice of some kind was sent to Fred Block, and he did not send it to us at all in time; therefore the appeal was not perfected.' He says, ' We got a malpractice suit going against, or could have going against Fred Block.' So I said, 'But what happens to me in the meantime?' He said, 'I am sorry, but you have to go down now and turn yourself in.'"

He did turn himself in, on that day. (T39-17, 18)

After that date, he did not talk to Rosen or Cohn any further about the matter. (T39-19 to 23)

Neither Rosen nor Cohn had ever advised him that the appeal had been dismissed. (T40-3 to 5)

The client further testified that he incurred a legal fee of $2,500 for the reinstatement of his appeal. (T64-4 to 10)

On recross, he testified that the first $5,000 that he gave to Cohn, in October of 1971, was not in payment for his son's legal

fees. (T65-18 to 23) At the criminal trial with his son, the latter was represented by Mel Rubin from Cohn's firm. (T66-5 to 21) Rubin told Milton Raffer, the present plaintiff, that his son's check to Cohn's firm bounced, but no amount was stated. (T66-22 to 67-25)

The defendant, Michael Rosen, testified on behalf of the defendants that he went to work for Mr. Cohn at Saxe, Bacon & Bolen, in the beginning of January, 1972. (T85-2 to 16) He was hired by Cohn and the name of the firm was Saxe, Bacon & Bolen. At that time, he was not a member of the firm, but an associate. (T86-5 to 10)

He first met the client in the first or second week of January, 1972. (T85-12 to 16) He further testified (T87-5 to 14):

> "Mr. Raffer also, I believe, at the initial conversation has indicated to me that he was thankful or grateful that Mr. Cohn was going to undertake to get the brief out; that part of the price, though, was that he had to make good some $5,000 worth of checks that his son Bennett had bounced on the firm. I believe he told me that the fee was $5,000 plus whatever the costs were, and that he was just grateful that Mr. Cohn was going to either put together the brief or I think argue the appeal for him. I think that is what he told me he came to Mr. Cohn for."

He further testified (T88-11 to 19):

> "Q Did you know when the papers or the brief and the appendix had to be filed with the Court of Appeals on that

case when you first started to handle it? A I think so. It was to be filed, I believe, January 13, of 1972. Q What did you do in relationship to that date insofar as it applies to the case? A I made a motion before the Second Circuit for an extension of time to file the brief and appendix."

When he filed the brief and appendix, they were not accepted. (T89-11 to 13) He told the client that there had been a mixup at the Court of Appeals; that the appeal was not being accepted and that he would do everything he could to get the appeal reinstated; that he had checked into it and found out that the court had granted part of his motion, giving him additional time; that the notice from the court had been sent to Fred Block and "we never received the notice; and that he had asked Mr. Block about it and he said he had received it but mailed it "to our office"; and that "we just never received any notice whatsoever as to the Court of Appeals' determination or order. (T91-3 to 22)

Rosen then testified as to his motions to reinstate and to reargue that motion, and the denial of the motions; that he told the client that the motions had been denied. (T92-4 to 17)

He further testified that on February 4, 1972, a substitution of attorney of Saxe, Bacon & Bolan for Mr. Block was effectuated, and filed. (T95-17 to 24)

On cross, he gave the following answers to questions, inter alia:

"I just don't remember"; "Possibly, yes." (T97-18, 25)

"I am not sure"; "I may have"; "I just don't recall." (T98-11, 13, 18)

"I don't know * * *"; "It's possible. I am just not sure * * *"; I am just not sure * * *"; "I don't recall." (T99-5, 13, 18, 21)

"I am not sure"; "I am just not sure"; "I don't recall * * *"; "I am not sure"; "Or again I am not sure, I don't recall." (T100-3, 5, 7, 13, 16, 17)

Rosen became a partner in the firm in January, 1973. (T101-10, 11)

The partners in January of 1972 were Cohn, Scott E. Manley and Mr. Driscoll. (T101-12 to 16)

When Rosen worked on the brief and the appendix, he was employed by Saxe, Bacon & Bolan. "I was given the task to put the brief together, and I consulted with Mr. Cohn. I talked to him about it often, but as far as direction is concerned, I did it pretty much on my own, the research and the reading of the record." (T105-13 to 22)

He further testified (T109-25 to 110-18):

> "Q * * * Why did you (110) expect to be notified by the clerk on the extension of time? A Because the backs had Saxe, Bacon. * * * Q Did you send any letter to the clerk telling them to advise you or did you call the cle. to advise you? A I don't recall sending any letters and I don't recall calling the clerk of the court for the disposition of the motion."

He did not file a substitution of attorney when he filed the moving papers for the extension. It was filed on February 4. (T111-8 to 11)

ARGUMENT
(Underscoring ours, unless otherwise noted.)

POINT ONE: THE EVIDENCE BELOW SUPPORTED THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT OF THE COURT BELOW.

The basic finding of Judge Gagliardi was (T138-9 to 21):

> "The defendants failed and neglected to ascertain what had happened with their motion (for extension of time), and in due course, in accordance with the directions of the Court of Appeals, the appeal was dismissed. I find that the conduct of defendants in this respect was legal malpractice, first, in failing to file a stipulation of substitution substituting themselves as attorneys of record in the place and stead of Frederick Block, and failure further to ascertain what had happened with their motion after the application had been filed, inasmuch as common practice would alert them to the fact that the Court of Appeals promptly decides motions such as the one that was filed here."

"An attorney must be presumed to be familiar with the law and rules regulating the practice in actions which he undertakes to bring. This part of the business of the practice of law pertains especially to the duties of an attorney. It is, substantially, merely clerical or mechanical in its character; and ignorance of the law and rules of practice, on the part of attorneys, or negligence in conforming to them in obtaining judgments, are altogether inexcusable. Such ignorance and negligence subject an attorney to actions for injuries which their clients may sustain." Von Wallhoffen

v. Newcombe, 10 Hun 236, 240 (1877). The court says, on page 241:

> "* * * Mr. Justice DANIELS, at General Term, said: 'That was an inexcusable irregularity, indicating a gross inattention to the condition of the proceedings on the part of the plaintiff's attorney.'"

And:

> "In these days, when lawyers are made with such easy and rapid facility, their unfortunate clients ought not to be deprived of such protection as the right of action for malpractice can secure." (Emphasis by the court.)

As the court says, in Christoffel v. United States, 190 F.2d 585, 590 (App. D. C. 1950):

> "* * * Counsel could have consulted the clerk of the * * * Court through the mails or by telephone."

In United States v. Hayes, 378 F.2d 567, 568 (4 Cir. 1967), the court says:

> "This Court endeavors to treat counsel * * * with consideration, and inadvertent oversights which are readily acknowledged and promptly rectified may be excused. Such complete indifference to his duties and obligations as a lawyer as to take absolutely no steps to comply with the rules of this Court, after the means of correcting an initial, apparently inadvertent, default had been tendered to him, is beyond our condonation."

And in State v. Graham, 184 S. W. 1190, 1191 (Mo. App. 1916), the court says:

"It is suggested in support of the motion filed that the attorney for the appellant did not receive a copy of the printed docket showing when this case was set for argument. Even though counsel failed through some mistake or miscarriage to receive a copy of the printed docket from the clerk of this court, this would not relieve him of the duty of knowing that his case would be on the docket for submission at the return term of his case; and especially is this true where the attorney knows that the cause has been continued at a former term of this court. It is the duty of an attorney to know the things the law requires him to know about his litigation in the appellate court, and, as he must know from the statute that his case has been docketed at least 40 days before the beginning of the term, he will be required to ascertain the day on which his case is set, even though, as claimed in this motion, he failed to receive a copy of our docket."

Nor are the defendants excused by the fact that the client's trial attorney was responsible for representing him on appeal until relieved by this Court, under Rule 4(b)(a). The defendants undertook their own responsibility by engaging with the client to represent him on the appeal and by applying to this Court for the fatal extension of time to file his brief and appendix.

A. All of the law partners of the defendant Cohn are liable with him for his negligence and that of the defendant Rosen.

"A partnership between attorneys is admitted to be lawful. Like other partnerships, it may be composed of two or more individuals, and all will be responsible for the acts of each, within the scope of partnership. They constitute but one person in law. * * * If a suit instituted in the name of one, should be unskillfully conducted, the other would be responsible to the client in an action for his damages * * * Indeed, every responsibility which belongs to other partnerships attaches also to this; * * *." Warner & Post v. Griswold, 8 Wend. 665, 666 (1832). (Emphasis by the court.) In Model Building & Loan Ass'n v. Reeves, 201 App. Div. 329, 194 N. Y. S. 383 (1922), members of a firm of attorneys were held liable for the embezzlement of the money of a client by another member of the firm, without their knowledge or participation. And in Lichtenheld v. Bersen, 285 N. Y. S. 585 (App. Div. 1936), an attorney who was without fault was held liable for a deceased partner's misconduct, notwithstanding that there were no assets in the partner's estate.

When one member of a law firm is retained or employed, such employment or retainer is that of the entire firm. Ganzer v. Schiffbauer, 59 N. W. 98 (Sup. Ct. of Neb. 1894). Attorneys who are partners engaged in the practice of law are each responsible for fraud and negligence of the other when acting within the scope of ordinary business of an attorney. Smyrna Developers, Inc. v. Bornstein, 177 So.2d 16 (Fla. App. 1965). See, also, Priddy v. MacKenzie, 103 S. W. 968 (Sup. Ct. of Mo. 1907).

All of the partners of the defendant Cohn were liable for the negligence of the defendant Rosen. An attorney at law is liable to his client for the negligence of his employee, and the fact that such employee is himself a competent lawyer does not relieve the attorney employing him from liability to his client on account of such negligence. Walker v. Stevens, 79 Ill. 193 (1875).

B. The defendant Rosen was liable for his own negligence.

"Acts of omission constitute active negligence as well as acts of commission, where there is an affirmative duty to act." Colon v. Board of Education of City of New York, 11 N. Y.2d 446, 184 N. E.2d 294, 298 (1962).

C. Judgment was not improperly entered against the defendant Rosen.

In their brief (page 6), defendants refer to a ruling made by Judge Gagliardi in the following colloquy (T127-16 to 20):

> "(THE COURT) Mr. Rubin and Mr. Rosen at the time complained of here were associates? MR. FRANZBLAU: Yes, your Honor. THE COURT: And motion to dismiss as them is granted."

Then the defendants' brief (same page) refers to the court's direction to the clerk to enter judgment, at the close of the statement of findings of fact and conclusions of law--in this colloquy (T141-5 to 25):

> "(THE COURT) In sum, I find for the plaintiff * * * against all defendants remaining in the sum of $13,528.03,

together with interest from the date of payment -- MR. WEISS: Would your Honor please clarify the phrase 'all defendants remaining'? MR. FRANZBLAU: May I say before -- THE COURT: Just a moment. -- with interest from the date on which the plaintiff made those payments. The remaining defendants, as I believe they stand before the Court, are Roy M. Cohn, Scott E. Manley, Daniel J. Driscoll, Michael Rosen, and the firm of Saxe, Bacon & Bolan. The foregoing constitutes the findings of fact and conclusions of law. The clerk may accordingly enter judgment in accordance with this decision. MR. FRANZBLAU: If your Honor please, I just want to invite your attention to the fact I checked in the clerk's office and found that in fact Mr. Rubin had not been served. But it is moot. THE COURT: I did not direct judgment against him."

The defendants' brief further says (same page):

"The Court dismissed the complaint against the defendant Michael Rosen (p. 16a) and did not in any manner change its decision. * * * The Court apparently overlooked its dismissal in the morning session of the complaint against the defendant Rosen, therefore entry of judgment was improper."

That is not so. Immediately after the court's statement that

the motion to dismiss as to Rubin and Rosen was granted, trial counsel for the plaintiff asked to "be heard on that." (T127-19 to 22)

The following colloquy then ensued (T127-23 to 130-15):

"MR. FRANZBLAU: If your Honor please, the mere fact that they (Rubin and Rosen) both worked on the brief -- there is testimony they both worked on the brief -- so that the mere fact that (128) they are employees does not excuse them. The firm is held in on the basis of perhaps respondeat superior, * * * THE COURT: There is no proof that Mr. Rosen or Mr. Rubin received any of the fee here or made any deal separately with Mr. Raffer, is there? MR. FRANZBLAU: No; but, your Honor, if they were negligent they are responsible for damages. * * * the mere fact that you are an employee does not exculpate you from liability. THE COURT: What is Mr. Rubin's negligence? MR. FRANZBLAU: The testimony is, he worked on this. THE COURT: But he does not have the responsibility for filing a substitution of attorneys. MR. FRANZBLAU: Mr. Rosen in his affidavit says that he worked and he undertook it and he filed the papers and he did not file the substitution of attorney, and he undertook the responsibilities for the filing, and he did not cause the substitution of attorney to be filed. He was the one who filed the papers; he was the one who was working on the brief. He applied for the extension. (129) * * * THE COURT: * * * Mr.

> Rosen did not go with the firm until January of 1972. MR. FRANZBLAU: Yes, your Honor, but Bacon, Bolan took the responsibility, and he as an employee in that firm said he did the brief, he was the one who made the application for the extension, he is the one who is responsible basically in the firm for the negligence of the firm. I would like to invite your attention to this case of State v. Graham -- THE COURT: I know that the person who does it even though he is an employee can be held ultimately liable and can be initially liable. I am aware of that proposition of law. MR. FRANZBLAU: * * * (130) * * * I mean, even in the affidavits on file here, Mr. Rosen specifically says that he was the one who was responsible for working on these papers and taking over this situation."

Defendants say (brief, page 6) that the court "did not in any manner change its decision." However, there are several reasons why it must be presumed that the court did change its decision. First, trial counsel for the plaintiff had not been heard before the court's initial decision, viz., to dismiss as to the defendant Rosen. Second, we have the clear statement of the second decision, diametrically opposite in language and meaning to the first. Then we have the above-underscored statement of the applicable law, in no uncertain terms.

The defendant Rosen was not a law clerk, he was a lawyer, at the crucial times, in January, 1972. He had been admitted to the bar in December, 1964. In March of 1965, he became an assistant U. S. Attorney, remaining such until 1968 or early 1969. He was in the civil di-

vision and in the criminal division, tried cases for the Government and handled appeals. Thereafter, he became associated with another attorney, for whom he did everything: civil, criminal, tried some cases, worked on appeals. (T83, 84)

Judgment was not, therefore, improperly entered against the defendant Rosen. "Generally speaking, a trial court may amend, correct, modify, or otherwise change its findings and conclusions before entry of judgment or decree, * * *." 89 C. J. S. 474. A presiding judge has inherent authority to effect any change in findings and conclusions and judgment based thereon until the determinations become a court record, signed and completed, and entered as such. State of North Carolina v. Carr, 264 F. Supp. 75 (W. D. N. C. 1967), appeal dismissed 386 F.2d 129 (4 Cir. 1967). "Generally, when a District Court acquires jurisdiction over the parties and the subject matter of a case filed in its court, such jurisdiction continues, in the absence of statutory enactments to the contrary, until final disposition of the cause. * * * Until the entry of its judgment disposing of the litigation, such court has the inherent power to correct any error of its own which it may have previously made in its handling of the case." Cohn v. United States, 259 F.2d 371, 376 (6 Cir. 1958).

In Rice v. Simmons, 53 A.2d 587, 590 (Mun. App. D. C. 1947), the court says:

> "Until a trial judge. sitting without a jury, makes a formal decision or finding which is entered in the minutes and

docket of the court, we believe that he has complete authority to change or amend any informal or tentative decisions he may have made during the progress of the trial, even to the extent of reversing them. This is true because up to that point the case * * * remains in the bosom of the court."

POINT TWO: IN VIEW OF FRCP 52(a), JUDGE GAGLIARDI'S FINDINS OF FACT SHOULD NOT BE DISTURBED BY THIS COURT.

In their brief (page 5), the defendants argue that the fee to be charged the client was to be $5,000 and costs (and not $10,000 and costs). They point to Rosen's testimony that the client had "indicated" to him "that part of the price * * * was that he had to make good some $5,000 worth of checks that his son Bennett had bounced on the firm." But defendants ignore the contrary testimony of the client, which was that the first $5,000 that he gave to Cohn, in October of 1971, was not in payment for his son's legal fees. (T65-18 to 23) The matter was one of credibility, as was all of the testimony on both sides of the case, the client vs. Rosen. The findings of Judge Gagliardi thereon should not be disturbed by this Court.

FRCP 52(a) provides, in part:

"In all actions tried upon the facts without a jury * * * the court shall find the facts specially and state separately its conclusions of law thereon, * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In Wilson v. United States, 229 F.2d 277, 279 (2 Cir. 1956), this Court says:

> "* * * But the trial judge, who saw and heard the witnesses, had discretion to disbelieve all the testimony to that effect. We cannot revise his evaluation of the witnesses' credibility, for the 'demeanor evidence' has escaped our scrutiny."

When the trial judge has seen the witnesses, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they "must be treated as unassailable." United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2 Cir. 1945). In Vaccaro v. Alcoa Steamship Company, 405 F.2d 1133, 1138 (2 Cir. 1968), this Court says:

> "* * * A fair reading of Judge Cooper's opinion reveals that he merely accepted plaintiff's version of the facts. To do so was not error within the meaning of Fed.R.Civ.P. 52(a)."

"(E)xcept in the most extraordinary circumstances, the determination of the triers of fact on questions of credibility must be accepted." N. L. R. B. v. Local 3, International Bro. of Elec. Wkrs., 362 F.2d 232, 235 (2 Cir. 1966).

CONCLUSION

It is therefore respectfully urged that the judgment below be, in all respects, affirmed.

Respectfully submitted,

Sam Weiss

SAM WEISS
Attorney for Plaintiff-Appellee

S. M. CHRIS FRANZBLAU,
Of Counsel.

PLAINTIFF

EX 2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA,

Appellee,

- against -

MILTON RAFFER,

Appellant.

Docket No.
71-2138

- -

On Appeal From the United States
District Court for The Southern
District of New York.

- x

S I R :

PLEASE TAKE NOTICE that the undersigned will move this Court for an order, pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure, enlarging the time within which appellant may file his appendix and brief from January 13, 1972 to February 24, 1972.

Dated: New York, N. Y.
January 11, 1972

SAXE, BACON & BOLAN
Attorneys for Appellant
39 East 68 Street
New York, N. Y. 10021
472-1400

To:
WHITNEY NORTH SEYMOUR, JR.
United States Attorney
Southern District of New York
Attorney for United States of America
U. S. Courthouse
Foley Square
New York, N. Y.

Exh "C"

PLAINTIFF

Ex 2

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MILTON HEFFER,

Appellant.

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

ROY M. COHN, being duly sworn deposes and says:

I am a member of the firm of Lane, Bacon & Bolan, attorneys for appellant and make this affidavit in support of appellant's motion for an order permitting the filing of appellant's brief and appendix.

As will be demonstrated below, appellant has been deprived of his right to have his appeal considered by this court on the merits, through no fault of his own or of his present counsel.

Appellant, a certified public accountant, stands convicted after a trial by jury of various counts of an indictment charging the use of interstate commerce to effect a scheme to defraud relating to securities and the delivery and sale of unregistered securities.

On November 11, 1971, appellant was sentenced to one year imprisonment on each of Counts 1-7, 9-13, 15, 16, 18-41 and 44-47, inclusive, to run concurrently with each other. The appellant was fined $10,000 on Count 1 and $5,000 on each of Counts 2 and 10.

Appellant's Notice of Appeal was filed November 16, 1971 by his attorney, Frederick Block. A copy of said Notice of Appeal is annexed hereto as Exhibit "A".

By order dated December 3, 1971, the Honorable Henry J. Friendly directed, among other things, that the record be docketed on or before December 13, 1971;the brief and appendix of appellant be filed on or before January 13, 1972 and that if appellant's brief or appendix are not filed by the time directed, the Clerk is directed to dismiss the appeal. Said order also noted that Frederick Block "is counsel of record" for appellant. A copy of said order is annexed hereto as Exhibit "B"

As required, the record was timely filed.

Prior to January 11, 1972, an associate of my firm telephoned the Assistant U.S. Attorney in charge of this action attempting to obtain consent for an application for an extension of time for the filing of appellant's brief and appendix. The Assistant advised that he would not consent thereto.

Thereafter by Motion dated January 11, 1972, appellant moved for an order, pursuant to Rule 26(b) of the Federal Rules

of Appellate procedure, enlarging the time within which to file his appendix and brief from January 13, 1972 to February 24, 1972. A copy of said motion and my affidavit in support thereof is annexed hereto as Exhibit "C".

On January 13, 1972, Judge Friendly granted the motion permitting the filing of appellant's brief and appendix on or before January 28, 1972. Judge Friendly's order contained a direction that in default thereof the Clerk was to dismiss the appeal.

Neither I nor my office was notified of this order. In short, we did not know that January 28, 1972 was the deadline for the filing of appellant's brief and appendix.

It is now known that the Clerk's office transmitted said order to Frederick Block, notwithstanding the appearance of my firm's name on the motion of January 11,1972. Apparently since Mr.Block neither moved to be relieved nor was in fact relieved by this Court, the Clerk's office considered him to be appellant's counsel, and mailed said order to him.

Neither my office nor I ever received notification from Mr.Block as to the January 28, 1972 filing date.

On February 3, 1972, Michael Rosen, Esq., an associate of my firm, who had been with us less than one month, telephoned the Assistant U.S. Attorney assigned to this action to discuss the contents of the Appendix. Mr.Rosen learned at that time that the appeal had been dismissed on January 28th.

Mr.Rosen immediately, and in my absence,prepared

a motion for an order vacating the dismissal of the appeal. Mr.Rosen's affidavit in support of said motion is annexed hereto as Exhibit "D".

On February 7, 1972, upon my return from Europe, I was first advised of the dismissal of the appeal. After a thorough search of our office and interrogation of everyone employed there, I wrote a letter to Judge Friendly (with a copy to the Assistant) stating that the order containing the January 28th deadline was never received by us nor did Mr.Block telephone to advise of same. I also stated that the brief and appendix would be filed that week. A copy of said letter is annexed hereto as Exhibit "E".

The very next day, (February 8, 1972) in my reply affidavit, I stated that the brief and appendix were in the hands of the printer and that we would be able to file them "almost immediately". A copy of said reply affidavit is annexed hereto as Exhibit "F".

On February 9, 1972, after being advised by our printer that the brief and appendix were ready to be filed, I prepared a letter to the Clerk of the Court (with copy to the U.S. Attorney) that the brief and appendix were being filed, subject to the Court's permission. A copy of said letter is annexed hereto as Exhibit "G".

On February 22, 1972, nearly two weeks after the submission of the brief and appendix to the Clerk, Judge Friendly denied our motion to vacate the dismissal of the appeal.

justice and due process of law, this Court direct that the dismissal of appellant's appeal be vacated and that the appeal be reinstated and considered on the Merits.

Roy M. Cohn

Roy M. Cohn

Sworn to before me this

7th day of March, 1972

Michael Rosen

MICHAEL ROSEN
NOTARY PUBLIC, State of New York
No. 41-3043703
Qualified in Queens County
Commission Expires March 30, 1973

PLAINTIFF

EX 4

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- -x

UNITED STATES OF AMERICA,

Appellee,

-against-

MILTON RAFFER,

Appellant.
- -x

AFFIDAVIT IN SUPPORT OF MOTION

Docket No. 71-2138

On Appeal From the United States District Court for The Southern District of New York
- -x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

MICHAEL ROSEN, being duly sworn, deposes and says that:

I am an associate in the firm of Saxe, Bacon & Bolan, attorneys for the Appellant herein, and I make this affidavit in support of a motion for an order vacating the dismissal of the appeal herein, which appeal was dismissed by the Clerk of the Court on January 28, 1972, and for an order permitting the appellant until February 24, 1972 to file his appendix and brief.

Your deponent makes this affidavit instead of Roy M. Cohn, counsel to this firm who undertook the responsibility of prosecuting this appeal, since Mr. Cohn at this very instant that this affidavit is being dictated is unavailable. Because of the seriousness of this application and the fact that your deponent,

Exh. D

no more than fifteen minutes ago learned of the dismissal of the appeal and the dire circumstances that flow therefrom, I am taking the liberty of dictating and submitting this affidavit with the most urgent request that this application be granted.

By motion dated January 11, 1972, Saxe, Bacon & Bolan as attorneys for appellant, moved this Court pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure for an order enlarging the time within which appellant may file his appendix and brief from January 13, 1972 to February 24, 1972. A copy of said motion and supporting affidavit is annexed hereto as Exhibit "A".

Your deponent personally handed the motion papers to Mr. Daniel Fusaro, Clerk of the Court, on January 11, 1972. Mr. Fusaro told your deponent that I would be advised as to the Court's disposition on that motion.

Up until 4:00 P.M. this afternoon, neither your deponent nor anyone else connected with Saxe, Bacon & Bolan has heard any word from the Court concerning said motion. Your deponent, together with Mr. Cohn, have been working on the preparation of the brief. At 4:00 P.M. this afternoon your deponent telephoned Assistant U. S. Attorney Kelleher to discuss stipulations concerning the contents of the appendix. Mr. Kelleher expressed surprise that I was calling concerning same and told me that appellant's appeal had been dismissed this past Friday for failure to file a brief.

Your deponent immediately telephoned the office of the Clerk of the Court and spoke to a Mr. Pitrisso, who advised that

indeed our motion for an extension of time was granted by order of the Court dated January 13, 1972, but, however, notification to such effect was sent to Frederick Block, Esq., appellant's prior counsel.

Your deponent states to this Court that this office was never notified by Mr. Block of the receipt of such order and had no knowledge that the motion was granted and to what date the Court extended Appellant's time to file his appendix and brief.

Your deponent cannot stress sufficiently enough the shock felt as this affidavit is being dictated. Your deponent represents to this Court that in his humble opinion significant points in favor of a reversal of the judgment of conviction exist in this case. To deprive appellant of the opportunity to present these points to your Honorable Court, through no fault of his own, would be a great miscarriage of justice.

Your deponent humbly requests that this Court vacate the dismissal of this appeal and permit appellant until February 24, 1972 to file his appendix and brief.

Your deponent wishes to personally apologize to this Honorable Court for any inconvenience this matter may cause.

Michael Rosen
MICHAEL ROSEN

Sworn to before me this
3rd day of February, 1972.

Gerald Ament

GERALD AMENT
NOTARY PUBLIC, State of New York
No. 03 0084100
Qualified in Bronx County
Commission Expires March 30, 1973

PLAINTIFF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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Ex 5

UNITED STATES OF AMERICA,

Appellee,

-against-

REPI

Doc)

MILTON RAFFER,

Appellant.
- - - - - - - - - - - - - - - - - - -x

On the Appeal from the United States District Court for the Southern District of New York

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STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

ROY M. COHN, being duly sworn, deposes and says:

I am a member of the firm of Saxe, Bacon & Bolan, attorneys for the appellant herein and make this affidavit in reply to the affidavit of United States Attorney John J. Kelleher submitted in opposition to appellant's motion for an order vacating the dismissal of the appeal herein, and received today, February 8, 1972, following the delivery of our letter to the Chief Judge, with copy to Mr. Kelleher.

The position taken by the Assistant District Attorney in opposition to this motion is disappointing. To oppose a convicted citizen's right to have his appeal considered by the Court, especially when the dismissal of such appeal was caused through inadvertence, not attributable to appellant or appellant's present counsel, seems an inequitable position.

Exh E.

To set the record straight, I have carefully checked our entire office and have spoken to everyone employed here concerning the possible receipt from the prior counsel, Mr. Block, of the Order of the Court granting our motion and providing for an extension of time to file the appellant's appendix and brief, which was mailed to him. No such order has been located in this office and everyone to whom I spoke is certain that no such order was ever received by us from appellant's prior counsel. Furthermore, appellant's prior counsel did not telephone this office concerning receipt by him of such order, or to the effect he was sending it to us, or to inquire if we had received it despite the obvious urgency of this matter.

At the instant this affidavit is being dictated, appellant's brief and appendix have been delivered to the printer, and we shall be able to file them almost immediately, and to argue the appeal at any early date fixed by this Court.

It is most respectfully requested that, in view of all the circumstances herein, that this Court grant appellant's motion to vacate the dismissal of this appeal.

ROY M. COHN

Sworn to before me this
9th day of February, 1972.

MICHAEL TO... N... Yo...
NOTARY PUBLIC, State ... N... Yo...
No 41-3348705
Qualified in Queens County
Commission Expires March 30, 1973

PLAINTIFF

EX 6

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

MILTON RAFFER,

Appellant.

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

ROY M. COHN, being duly sworn, deposes and says:

I am a member of the firm of Saxe, Bacon & Bolan, attorneys for the appellant herein and I make this affidavit in support of appellant's motion seeking reargument of his motion for an order vacating the dismissal of the appeal herein.

It is respectfully submitted that the court may have overlooked the fact that appellant's brief and appendix were filed with the Clerk of the Court on February 9, 1972 subject, of course, to the court's granting leave permitting the filing thereof. The U. S. Attorney was similarly served with the requisite copies of the brief and appendix on said date. A copy of my letter to the Clerk of the Court transmitting said brief and appendix is annexed hereto as Exhibit A.

In view of the fact that appellant's brief and appendix were filed more than two weeks ago and particularly in view of what we believe to be the substantial nature of this appeal, we

appellant's motion

heretofore made and permit the consideration of the appeal on the merits.

Roy M. Cohn

Sworn to before me this

23rd day of February, 1972.

Notary Public

[illegible] ROSEN
NOT[illegible] State of New York
[illegible]
[illegible] County
[illegible] March 30, 1973

15a

PLAINTIFF

EX 7

Saxe, Bacon & Bolan

39 EAST 68TH STREET
NEW YORK, NEW YORK 10021
(212) 472-1400

JOHN GODFREY SAXE (1909-1953)
ROGERS H. BACON (1919-1962)

ROY M. COHN
SCOTT E. MANLEY (ADMITTED ILLINOIS AND INDIANA)

DANIEL J. DRISCOLL

MELVYN RUBIN
MICHAEL ROSEN
HAROLD L. SCHWARTZ

May 19th
1972

~~PLTF. EXBT.~~ FOR IDENT.

DEFT. EXBT. A M. KORENMAN
2/24/75

Mr. Milton Raffer [#75280-158 E-X]
P. O. Box 1000
Lewisburg, Pennsylvania 17837

Dear Milton:-

I have your letters and I am going over your papers with Mike Rosen in some detail next week to see the proper course of action.

We will certainly take some action. I am considering writing to Judge Cannella concerning early parole.

We will keep you posted.

Sincerely,

ROY M. COHN

RMC:at

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MILTON M. RAFFER,

Plaintiff-Appellee

-against-

ROY M. COHN, THOMAS A. BOLAN, SCOTT E. MANLEY, DANIEL J. DRISCOLL, MELVYN RUBIN, MICHAEL ROSEN AND HAROLD L. SCHWARTZ, members of the law firm of SAXE, BACON & BOLAN

Defendants-Appellants

Civil Action

AFFIDAVIT OF MAILING

Docket No. 75-7692

STATE OF NEW JERSEY)
SS
COUNTY OF ESSEX)

MARGARET C. MIKLAS, of full age, being duly sworn according to law, upon her oath, deposes and says:

1. I am a secretary with the law firm of Franzblau, Falkin & DiMarzio, attorneys for Plaintiff in the above captioned matter.

2. On March 31, 1976 I mailed in the post office in Newark, New Jersey, by certified mail #161547, return, receipt requested, two copies of Plaintiff-Appellee's Brief to the law firm of RIPPA, LANG, NESCI & O'TOOLE, 271 North Avenue, New Rochelle, New York.

Margaret C Miklas
MARGARET C MIKLAS

Sworn and Subscribed to
before me this 31st day
of March, 1976.

Steven F. Kaplan
STEVEN F. KAPLAN
Attorney at Law of New Jersey